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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

NO. 1135

WILLIAM GEORGE MIENTKE

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

William George Mientke
Petitioner

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William George Mientke, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on December 26, 1967.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court printed in appendix B hereto, infra P 12 is unreported. The opinion of the Circuit Court of Appeals, printed in appendix B hereto, infra P 12, will be reported in the Federal Reporter (citation presently unknown).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 26, 1967. The jurisdiction of this Court is involked under 28 U. S. C. Section 1254 (1). On January 26, 1968, an order extending the time for filing petition for writ of certiorari to and including February 20, 1968, was duly entered by Justice Thurgood Marshall.

QUESTIONS PRESENTED

Whether an individual has a Constitutional right to confrontation and assistance of counsel upon a personal appearance before his local board.

Whether an individual has a Constitutional right to assistance of counsel and to be warned against self-incrimination upon appearance before his local board.

STATUTE INVOLVED

The statutory provisions involved are Constitution of the United States Amendments V and VI; 50 U. S. C. section 462; and 32 C. F. R., section 1624. 1.

STATEMENT

The District Court obtained jurisdiction of this case as it arose under a violation of federal statutes. This action was commenced on September 9, 1966, by the filing of a complaint before the United States Commissioner. The petitioner, William George Mientke was arrested and subsequently enlarged on bail and has been and remains at liberty since that time. The petitioner having executed a written waiver of indictment prosecution was made by information. Thereupon an information was filed by the United States Attorney, charging petitioner with violation of 50 U. S. C. Section 462, by failing and refusing to report to his local board for assignment to work of national importance under civilian direction. To the information the petitioner entered a plea of not guilty.

Trial was had to the Court sitting without jury at Madison, Wisconsin, the Honorable James E. Doyle, District Judge, presiding on January 3, 1966. At the close of the evidence the petitioner filed written motion for judgment of acquittal, which motion was taken under advisement by the Court.

On January 11, 1967, the Court entered its findings and adjudication of guilty, and decision and judgment in which the petitioner's motion for acquittal was denied. The petitioner was sentenced to imprisonment for a term of two (2) years pursuant to the judgment of guilty on June 2, 1967.

Appeal to the United States Circuit Court of Appeals for the Seventh Circuit was timely made by filing notice of appeal on June 8, 1967. Briefs were filed and argument heard before the Court of Appeals which entered its judgment affirming the Judgment of the District Court on December 26, 1967.

REASONS FOR GRANTING THE WRIT

The importance of deciding the question presented is clear from there impact on the administration of the Universal Military Training Act of 1948.

Settlement of these questions by this Court is plainly in the public interest since it will effect the rights of all the males subject to the selective service system.

The only procedures by which a registrant can obtain judicial review of his selective service classification, are by Writ of Habeas Corpus proceeding; Eagles v. United States ex rel. Samuals, 329 U. S. 304, or by a criminal proceeding, Estep v. United States, 327 U. S. 114. In both the Habeas Corpus proceeding and criminal prosecution the scope of judicial review of the Trial Court is extremely limited. This is pointed out in Estep v. United States, 327 U. S. 114, 122 when the Court states:

> "...the courts are not to weigh the evidence to determine whether the classification made by local boards was justified. The decisions of local boards made

> in conformity with regulations are final even though erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Due to this limited scope of review, the District Court is placed in the position of an appellate review body in any subsequent criminal proceeding. Under such circumstances it would seem essential that the registrant be given all the constitutional safeguards of a criminal proceeding at his appearance before the Local Board. The code of Federal Regulations, however, provides in 32 CFR section 1624.1 (b), infra p. 11 , that no registrant may be represented before the local board by anyone acting as attorney or legal counsel. This is in conflict with the guarantees of the Sixth Amendment to the United States Constitution.

Further, the registrant is not allowed the right of confrontation of the witnesses against him at his appearance before the Local Board which results in a further conflict with the Sixth Amendment guarantees.

The proceeding before the Local Board is also in effect an interrogation of the registrant as the evidence which will be used in the District Court proceedings, is compiled, to a large extent during his appearance. It would therefore seem essential that the registrant be informed of his right against self incrimination as provided in the Fifth and Sixth

Amendments to the Constitution and as articulated by the Court in Miranda vs. State of Arizona, 384 U. S. 436, 467. This right, however, is not granted at the Local Board appearance. These reasons would seem to make it clear that a determination should be made in this case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

William George Mientke
Petitioner

APPENDIX A

Amendments to the United States Constitution

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Universal Military Training Act
50 U. S. C. Section 462

§ 462. Offenses and penalties

(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-454 and 455-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or

neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this [said sections], or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title [said sections] unless such person has been actually inducted for the training and service prescribed under this title [said sections] or unless he is subject to trial by court martial under laws in force prior to the enactment of this title [June 24, 1948]. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall, upon request of the Attorney General, be advanced on the docket for immediate hearing.

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration

certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title [sections 451-454, 455-471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or

representation, unless the defendant explains such possession to the satisfaction of the jury. June 24, 1948, c. 625, Title I, § 12, 62 Stat. 622.

Code of Federal Regulations
Title 32, Section 1624.1

§ 1624.1 Opportunity to appear in person.

(a) Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: PROVIDED, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: AND PROVIDED FURTHER, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

APPENDIX B

In the United States District Court For Western District of Wisconsin

FINDING AND ADJUDICATION OF GUILT: (Formal Parts Omitted)

The above-entitled action having come on for trial before the Court without a jury on January 3, 1967, at Madison, Wisconsin, trial by jury having been theretofore specifically waived in writing by the defendant; and the Court having heard the evidence and the arguments of counsel, and having taken the matter under advisement; and now, on this 11th day of January, 1967, being fully advised in the premises, having rendered its decision and judgment herein, finding the defendant William George Mientke guilty as charged in the information:

Now, therefore, upon the evidence produced and upon said finding and upon all of the files, records and proceedings herein, the Court now finds and adjudges that the defendant, William George Mientke, is guilty of the crime charged in the information.

It is ordered by the Court that the Probation Officer of this Court conduct a presentence investigation of the defendant William George Mientke, and report to the Court the results of such investigation, together with his recommendations; that this action be and it is hereby continued pending the return of

said report, and that the bail bond of the defendant be continued in full force and effect until the further order of the Court.

Entered at Madison, Wisconsin, this 11th day of January, 1967.

BY THE COURT:

/s/ JAMES E. DOYLE
United States District Judge

In the United States District Court
Western District of Wisconsin

DECISION AND JUDGMENT
(Formal Parts Omitted)

This action came on for trial to the Court, without a jury, on January 3, 1967. Testimony and documentary evidence was offered and received, and oral argument was heard.

The Court finds, from the entire record, that on June 24, 1965, at the City of Wausau, Marathon County, in the Western District of Wisconsin, the defendant William George Mientke, did knowingly refuse to obey an order of Local Board No. 38, Marathon County, Wisconsin, to report as directed for civilian work at Madison General Hospital, Madison, Wisconsin, for 24 consecutive months; the Court finds that such civilian work contributes to the national health, safety, and interest.

The record includes the defendant's complete Selective Service file. From this file

the Court finds that from September 9, 1964, when defendant was initially classified by his local board as a conscientious objector (1-O) rather than as a minister (4-D), continuously to and through June 24, 1965, there was basis in fact in the record to support the refusal of the local board and of the appeal board to classify him 4-D. From the information furnished to the local board by the defendant himself, the board might reasonably have concluded that the defendant was employed at a lumber company for an average workweek of 50 hours, that he spent approximately 14 hours a week doing chores on the family farm at which he resided, and that he devoted approximately 20 hours per week to his religious activities.

Following his personal appearance before the local board on October 7, 1964, the defendant prepared a statement on October 14, 1964, which was received by the local board on October 15, 1964. In his written statement of October 14, he stated that he regularly engaged in the ministry "to the extent of at least 40 hours a month." At another point in the same written statement of October 14, the defendant indicated that he spent approximately 70 to 75 hours per month on his religious activity. At another point in his written statement of October 14, the defendant stated that he was devoting "at least 20 hours to the ministry each week".

Except for general explanations of the view of "ministry" held by members of the Watchtower Society of Jehovah's Witnesses, the

defendant furnished no evidence to the local board that he was spending more than approximately 20 hours a week in his religious activity.

At the trial of this action on January 4, 1967, the defendant was given an opportunity to present evidence concerning the time he was spending on his secular work and the time he was spending on his religious work during the period between his first classification by the local board as 1-0 (September 9, 1964) and the time at which he was ordered to report for hospital duty (June 24, 1965). His testimony in this Court was that he was spending approximately 64 hours a week in his employment at the lumber yard and on the home farm, and that he was spending approximately 23 to 24 hours a week in active religious work. He also testified that he was then spending approximately 20 to 25 hours a week in study and preparation for his active religious work. Although the defendant persisted in this latter statement under questioning by the Court, it seems likely that he was mistaking a monthly figure for a weekly figure, in view of his further testimony that he was sleeping approximately 56 hours a week, and spending approximately 28 hours a week in travel time, eating, dressing, and other miscellaneous activities.

Under the most favorable interpretation which it is reasonably possible to extend either to the statements given by the defendant to the local board or to his testimony at the trial in this Court, it appears that the defendant was spending not more than about 30 hours a week

in active religious work and in study and preparation for such active work.

On this record, there was basis in fact for a conclusion by the local board and by the appeal board for the Western District of Wisconsin that the defendant's religious ministry was not his regular and customary vocation; that he irregularly and incidentally preached and taught the principles of religion of his sect; and that he did not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship of his sect. 50 App. U.S.C., Section 466 (g).

At the time of the trial, and at the close of the government's case, the defendant moved for a judgment of acquittal on several grounds. The first ground was that the denial of the claim for 4-D classification by the local board and by the appeal board was without basis in fact; for the reasons given above the motion on this ground is denied. The second ground for the motion was that the local board and the appeal board had employed erroneous standards and had used an improper "orthodox measuring rod" in determining whether the defendant was a minister within the meaning of the Act and the regulations; an examination of the record indicates that the local board inquired whether the defendant received compensation as a minister and also whether he was a so-called "Pioneer minister" within the terminology of the Jehovah's Witnesses; however, it does not appear that either the local board or the appeal board used these factors

exclusively in arriving at its determination; the motion on this ground is denied. The third ground for the motion of acquittal is that the defendant's evidence with respect to his ministry is undisputed and uncontradicted and that no record was built in contradiction of his claim; however, as indicated above, the evidence offered by the defendant was itself insufficient to support his claim to exemption as a minister within the meaning of the Act and the regulations; no contradictory evidence was therefore required; the motion on this ground is denied.

The fourth ground of the motion was that the defendant had been denied substantive and procedural due process of law as guaranteed by the Fifth Amendment in that the defendant had been denied an appeal from the classification by the local board and in failing to accord him hearings in addition to the hearing held on October 7, 1964; the record discloses that the defendant requested and was granted an opportunity to appear before the local board and that he requested and was granted an appeal to the State Appeal Board; the record also reveals that all of the information which the defendant had supplied to the local board was available to and in the possession of the appeal board at the time of its action; procedural due process does not require that the appeal board accord a hearing to the defendant at that stage or that it accord the defendant the further opportunity to present written evidence at that stage; the motion on this ground is denied. The fifth ground of the motion for acquittal is

that, following the action of the appeal board in confirming the classification of 1-0 and denying the classification of 4-D, the local board abused its discretion by refusing to reopen the defendant's classification in April 1965; in April 1965, the defendant stated in a letter to the local board that he had additional information which he was willing to present on request; unless the defendant had taken the initiative to present new and significantly different evidence with respect to his status, the local board was not obliged to reopen the matter; the motion on this ground is denied. The sixth ground of the motion for acquittal was that there had been an insufficient showing by the government with respect to the propriety of selecting Madison General Hospital as the place for the defendant to perform his civilian work; the Court permitted the government to amplify the record in this respect at the trial after it had rested its principal case; permitting the introduction of this additional evidence was within the discretion of the Court; the evidence was sufficient to overcome the defendant's objection; the motion for acquittal on this ground is denied. Finally, the defendant rested his motion for acquittal on the ground that the government had wholly failed to prove the defendant guilty beyond a reasonable doubt; for the reasons stated above, the motion on this ground is denied.

For the reasons given, and upon the basis of the entire record herein, the Court finds

and adjudges the defendant guilty of the crime charged in the information on file herein.

Entered this 11th day of January, 1967.

BY THE COURT:

/s/ James E. Doyle
District Judge

In the United States Court of Appeals
For the Seventh Circuit

DECISION AND JUDGMENT
(Formal Parts Omitted)

Before Hastings, CHIEF JUDGE, and Knoch, SENIOR CIRCUIT JUDGE, and Cummings, CIRCUIT JUDGE.

Knoch, SENIOR CIRCUIT JUDGE. The defendant-appellant, William George Mientke, was tried and found guilty in a trial by the District Court, jury having been waived, of a violation of the United States Code, Title 50 APP. U.S.C.A. § 462, in failing to report to his Local Selective Service Board for assignment to civilian work of national importance, i.e. at Madison General Hospital. The Trial Judge imposed a sentence of two years' imprisonment and this appeal followed.

Congress has provided that the decisions of the Local Selective Service Board shall be final, except where an appeal is authorized and taken in accordance with the rules and

regulations prescribed by the President. Title 50 APP. U.S.C.A. § 460. The Appeal Board shall classify the registrant giving consideration to the various classes in the same manner as the Local Board. Regulation 1626.26(a). The decision of the Appeal Board is final unless appeal is taken to the President or the Local Board changes its decision. Regulation 1626.26(b). The classification proceedings of the Selective Service System have been repeatedly upheld as administrative in nature subject only to limited review as to whether there was a basis in fact for the finding. DICKENSON v. U. S., 346 U.S. 389 (1953); COX v. U.S., 332 U.S. 442 (1947); U.S. v. PETIACH, 7 Cir., 1966, 357 F. 2d 171. The defendant does not seriously question that principle.

The defendant takes the position that because of the limited scope of review the proceedings before the Local Board take on the character of a criminal proceeding in which the registrant should not be deprived of the protections and privileges provided under the Fifth and Sixth Amendments to the United States Constitution for one accused of a crime. This point was not argued in any detail before the District Court. Nevertheless we have given it consideration in this Court. The defendant complains that he was denied assistance of counsel, protection against self-incrimination, confrontation of witnesses, and opportunity for oral argument concerning the evidence considered in connection with his classification. He contends that the Local

Board members merely directed questions to him which he answered but that they cut short his attempts to elaborate on his answers. From the evidence adduced at the trial, and from letters he subsequently wrote the Board, it appears that some of this elaboration would have concerned comparison with unquestioned ministers and priests who devoted substantial portions of their time to matters other than strictly religious activity. It does not appear that the additional material as shown in the letters and statements made by the registrant would have been significantly different from the matters presented to and considered by the Local Board. In any event, all this added data was before the Appeal Board.

The appellant contends that the Local Board placed undue emphasis on his secular employment, disregarding the fact that a Jehovah's Witness Minister receives no salary and must find some other means of support, that he would quit such secular employment whenever it interferred with the practice of his ministry.

The Trial Judge in his opinion carefully reviewed all the evidence, Case No. CR 66-51, January 11, 1967, ... F. Supp. ... He notes that from varying statements, oral and written, as to the number of hours devoted by the registrant to his religious activities, the Board might reasonably have concluded that he spent approximately twenty hours per week in pursuit of his religious work and an average of fifty hours in gainful secular employment, plus fourteen hours per week on farm chores

at his residence. The Trial Judge heard testimony on this point by the defendant from which it appears that he was spending about sixty-four hours in secular employment and about twenty-four hours on active religious duties weekly. The defendant insisted that he spent an additional twenty to twenty-five hours weekly in study and preparation as distinguished from activity. The Trial Court thought there might have been some confusion here in the light of the time the defendant said he spent in sleep, travel, etc.

We agree with the District Court that the most favorable estimate would appear not to exceed about thirty hours per week for religious activity. We also agree with the District Court that there was a basis in fact for the conclusion that the defendant did not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship of his sect. Title 50 APP. U.S.C.A. § 466(g).

It was unnecessary for the Board to confront the defendant with witnesses. His own testimony provided the basis for a reasonable conclusion that he did not qualify for classification 4-D, Minister. The appellant was not denied procedural due process.

The proceedings before the Local Board are not converted from administrative in nature to criminal by virtue of the defendant's having subsequently been accused of the crime of failing to obey an order to report for civilian duty. He was in no way incriminating himself at the classification proceedings which

were purely administrative in nature and therefore did not require criminal safeguards. One accused of the crime of failure to report for civilian duty may raise the defense that the administrative body acted outside of its power during one of the steps leading to the order which the accused refused to obey. The Trial Court considered such a defense here and found it wanting. We agree with the reasoning of the Trial Judge. The privilege of raising the defense at some later date does not change the character of the earlier classification process.

The Court appreciates the skilled and devoted services rendered by Mr. Vernon Molbreak of the Wisconsin bar, who represented the defendant-appellant as Court-appointed counsel.

The judgment of the District Court is affirmed.

Affirmed.

A true Copy:

Teste:

CLERK OF THE UNITED
STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT